91-459

Supreme Court, U.S.
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Case No. _____

IN THE UNITED STATES SUPREME COURT

October, 1991

JOE NELSON and MARGARET NELSON,

Petitioners,

v.

PRODUCTION CREDIT ASSOCIATION
OF THE MIDLANDS,

Respondent.

APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

What is the proper procedure to be followed by the Court of Appeals when a verdict-winners' judgment has been taken away by the trial court by a judgment N.O.V. and the verdict-winners' request, for the first time in their petition for rehearing and suggestion for rehearing *en banc*, that the Court of Appeals remand the case to the trial court for determination whether a new trial should be granted?

LIST OF PARTIES

The parties to this proceeding are Joe Nelson and Margaret Nelson, husband and wife. The Nelsons live on a ranch in Alliance, Nebraska. The respondent is the Production Credit Association of the Midlands (PCA), which is one of several Farm Credit System lending institutions.

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GROUNDS OF JURISDICTION

Petitioners obtained a jury verdict against the respondent in the amount of $1,278,000.00 on May 26, 1989. (Petitioners' Appendix pgs. 3-4). Judgment was entered for the same amount on May 31, 1989. (Petitioners' Appendix pgs. 1-2). The trial court[1] granted petitioners' motion for judgment N.O.V. and, pursuant to FRCP 50(c), conditionally granted a new trial. (Petitioners' Appendix pgs. 6-42). Thereafter, the petitioners filed a timely appeal with the Eighth Circuit on September 22, 1989, pursuant to FRAP 4 with the jurisdiction to the Eighth Circuit based on 28 USC §1291. The Eighth Circuit[2] issued its ruling denying petitioners' appeal. (Petitioners' Appendix pgs. 43-64). Thereafter, petitioners filed a petition

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1 Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

2 John R. Gibson and William H. Timbers, conferring. Senior Judge Gerald W. Heaney, dissenting.

for rehearing and suggestion for rehearing *en banc* (Petitioners' Appendix pgs. 65-74 and 77-94), which was denied by the Eighth Circuit on May 17, 1991. (Petitioners' Appendix pgs. 75-76).

Jurisdiction of this court is based upon 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Seventh Amendment to the United States Constitution, 1791.

STATEMENT OF THE CASE

A. Nature of the case.

This case arises out of a relationship between Joseph and Margaret Nelson, long-time ranchers in western Nebraska, and the Production Credit Association of the Midlands, a lender of the Farm Credit

System. The Nelsons sued the PCA on theories of breach of contract to fund their ranching operation, misrepresentation, and negligence.

B. Course of proceedings.

This matter was commenced as an adversary proceeding in the United States Bankruptcy Court for the District of Nebraska on February 9, 1988. Thereafter, the United States Bankruptcy Court for the District of Nebraska recommended that the District Court withdraw the reference because the parties requested a jury trial on the issues. The United States District Court for the District of Nebraska referred the matter to the United States District Court for disposition on May 2, 1988.

C. Disposition by lower court.

A jury trial was held in North Platte, Nebraska from May 15, 1989 through May 25, 1989. On May 25, 1989, the jury returned its verdict in favor of the Nelsons on the

theories of breach of contract, negligence, and misrepresentation in the amount of $1,278,000.00, and judgment was entered on May 31, 1989 by the district court.

PCA filed a motion for judgment N.O.V. and, in the alternative, a motion for new trial on June 12, 1989. The trial court granted the motion for judgment N.O.V. on the issues of breach of contract, negligence, and misrepresentation and it granted a provisional order for new trial. The Nelsons then timely filed their notice of appeal with the Eighth Circuit Court of Appeals on September 22, 1989. The Nelsons' appeal was denied by a split panel, and Nelsons filed their petition for rehearing and suggestion for rehearing *en banc*. (See, Petitioners' Appendix pg. 65).

D. Statement of facts.

Joe and Margaret Nelson are ranchers from the sandhills of Nebraska. (Tr. Vol. 1, 12).[3] The Nelsons live upon a ranch approximately 30 miles from town. Mrs. Nelsons' grandparents homesteaded the property when they came to this country from Sweden. (Tr. Vol. 1, 13). The Nelsons bought the ranch from Mrs. Nelsons' family, working together in the operation of the ranch. (Id at 15). In 1975, the Nelsons switched operating lenders from a local bank to the Production Credit Association. They did this at the solicitation of a PCA loan officer, Mr. Jack Manion. (Id at 14, 15). The Nelsons believed that they were joining the PCA because the PCA was a cooperative

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3 These references are to the Trial Transcript, which is not part of the Petitioners' Appendix.

organization which was able to better help the Nelsons as a lender, counselor, and advisor. (Id at 15-17).

The financial arrangement which the Nelsons had with the PCA was that the PCA would have a lien of all Nelsons' livestock, ranch products, and machinery. All proceeds from agricultural sales went to the PCA and then the PCA reloaned money to the Nelsons as they needed it. The Nelsons were dependent upon the PCA to provide the day-to-day operating capital for the ranch. (Id at 19). From the time the Nelsons began with the PCA until 1983 they worked with one loan officer, Jack Manion, and the president of the PCA, Mr. Wayne Goff. (Id at 21, 22, 23). In 1983, Mr. Manion left the PCA and Mr. Goff took over the loan servicing for the Nelsons.

During the time the Nelsons were involved with the PCA, the PCA offered to loan them money and also other credit

services such as credit counseling and advice. (Id at 21), (Tr. Vol. 2, 266). After Mr. Goff worked with the Nelsons in 1983, they were introduced to a new loan officer, Mr. Tom Willnerd. Mr. Willnerd stated that his job with the Nelsons was as counselor and lender. (Tr. Vol. 8, 1797).

Before the Nelsons met Mr. Willnerd, they worked with a Mr. Rod Uhrig. Mr. Uhrig wrote to the Nelsons in August of 1985 requesting that they bring in a plan and also effect debt reduction with the PCA. (Tr. Vol. 1, 25). In order to bring in a viable plan to the PCA, the Nelsons went to the University of Nebraska Panhandle Station. (Id at 26, 17).

The ranch plan provided for additional stocking of the Nelsons' ranch and implementation of intensive grazing techniques. (Id at 29, 30).

The Nelsons took a copy of the ranch plan to Wayne Goff and Tom Willnerd (Tr. Vol. 2, 159; Tr. Vol. 6, 1077; Tr. Vol. 7, 1351. The Nelsons maintain that the PCA represented to them that there was no problem with going along with funding the ranch plan for the period of three years. (Tr. Vol.7, 1408); (Tr. Vol. 2, 181); (Tr. Vol. 5, 1107); (Tr. Vol. 7, Pg. 1343); (Tr. Vol. 5, 1077, 1080).

The Nelsons went about obtaining a long-term real estate mortgage on their ranch to pay down the PCA with the understanding that by obtaining the long-term money, the PCA would fund the ranch plan. (Tr. Vol. 7, 1344), (Tr. Vol. 2, 165), (Tr. Vol. 1, 29), (Tr. Vol.4, 763), (Tr. Vol. 6, 1080).

In any event, the PCA did not pay any heed to the ranch plan (Tr. Vol. 3, 404, 439), (Tr. Vol. 4, 588, 597), nor did the PCA loan officers call the authors of the

ranch plan, Dr. Pat Reece or Jim Robb from the University of Nebraska Panhandle Station. The PCA would not loan the Nelsons enough money to stock the ranch plan after the Nelsons had paid down the Travelers money. (Tr. Vol. 2, 189-215, 238) (Exhibit 145). Ultimately, the Nelson operation proved to be unprofitable because of its inability to generate insufficient cash flow. This suit followed.

ARGUMENT

The Seventh Amendment provides, in part, that "no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The petitioners in this case obtained a unanimous jury verdict on each of three particular causes of action (contract, misrepresentation, and negligence) (Petitioners' Appendix pgs. 3-4), which were taken away by the trial court on judgment N.O.V. in a mixed ruling

on law and fact, (Petitioners' Appendix pgs. 5-42). Development of Seventh Amendment jurisprudence requires the Supreme Court to review two questions posed by this case: (1) may a verdict-winner/appellant request a new trial from the Circuit Court or remand to the trial court for a new trial determination when that request has been made for the first time in the petition for rehearing and request for rehearing *en banc*, and (2) if the verdict-winner/appellant may make such a request, should the Circuit Court normally remand to the trial court for this determination.

In *Neely v. Eby Construction Co.*, 386 US 317 (1967), this court indicated that where a plaintiff-appellee urges grounds for a non-suit or new trial, consideration of the issue is more appropriately addressed by the trial court. *Neely* at 325, 326. This court suggested that

initial consideration of a verdict-winner/appellee's request for new trial to "fill a gap in his proof" should be considered by the District Court. *Neely* at 328.

The respondent in this case had an opportunity to move for a new trial. This was combined with its motion for judgment N.O.V. The District Court conditionally ruled upon the motion for new trial under FRCP 50(c) when it issued its ruling on the judgment N.O.V. Obviously, the petitioners were reluctant to urge or suggest a new trial at any time prior to the petition for rehearing or suggestion for rehearing *en banc*. The petitioners' primary desire was for a review of the judgment N.O.V. and a reinstatement of the verdict, and not to go back to trial. However, given the fact that a judgment N.O.V. is historically developed from the notion of a "demurrer to the evidence," the petitioners should be

entitled, at least, to an evidentiary hearing before the trial court to determine if, at a new trial, the petitioners could proffer sufficient evidence to ameliorate the concerns of law and fact expressed by the trial and Circuit Court in their separate opinions.[4] The order entered by the court on the petition for rehearing and suggestion for rehearing *en banc* was brief and did not deal with the petitioners' determination for new trial. (Petitioners' Appendix pgs. 75-76).

Neely specifically dealt with the issue of whether a verdict-winner/appellee could obtain a new trial or at least a hearing before the trial court to determine if a new trial is necessary. Petitioners

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4 The petitioners' attorney made a specific showing that the Nelsons could submit evidence to "fill the gaps" in the evidence perceived by the trial court and the Circuit Court and their respective opinions on the law and the facts. See Petitioners' Appendix pgs. 69-74.

urge this court to consider the important issue of whether a verdict-winner/appellant has the same right.

Consideration of this issue would develop Seventh Amendment jurisprudence at a time when some commentators have suggested that this court's safeguarding of the Seventh Amendment has waned over the last two decades. Schnapper, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis L Rev, 237. The nation is celebrating the Seventh Amendment's 200th anniversary this year (1791-1991). This review would provide a particular historic moment to review the extent of Seventh Amendment rights.

The general grant of power to appellate courts reveals that they may "require such further proceedings to be had as may be just under the circumstances." 28 USC §2106. The peculiar circumstance

here is that the verdict-winner as appellant in the Circuit Court did not assert their request for a new trial or a hearing for new trial before the District Court until the suggestion for rehearing or petition for rehearing *en banc*. This is a peculiar circumstance for the verdict-winner inasmuch as the verdict-winner, petitioner in this case, has no desire or incentive to assert a new trial before that point, but, under current decisional law, has no clearly defined method of asserting it earlier. In fact, requiring the verdict-winner to do so would be unfair. This court should first consider (1) whether a verdict-winner/appellant may petition the appellate court, in its petition for rehearing and suggestion for rehearing *en banc*, to grant a new trial or to remand for consideration by the trial court whether a new trial would be necessary, and (2) whether remand should be

the preferred method because of the trial court's understanding of the facts and circumstances of the case. Petitioners believe that this is a unique issue which the Supreme Court has not previously addressed.

The Circuit Courts have not specifically addressed the issue, although in varied circumstances have varied in their approach. For example, the First Circuit in *Systemized of New England, Inc. v. SCM, Inc.*, 732 F2d 1030 (1st Cir 1984), apparently reads *Neely* to require a remand for trial court's determination on the suggestion for new trial. The Third Circuit in *American Teacher Systems v. Pa State University*, 688 F2d 907 (3rd Cir 1982), revealed its understanding of *Neely* that a remand to the trial court for determination of a new trial was the preferred method, although not mandatory.

The Ninth Circuit in *Gough v. Rossmoor Corp.*, 533 F2d 453 (9th Cir 1976), appeared to say that the ruling on the question of new trial must be considered by some court, either appellate or trial, but did not state a preference. The other Circuit Courts have not appeared to rule on the issue.[5] If this court rules that a verdict-winner/appellant has a right to press a new trial request in its petition for rehearing, then the court must also consider the nature of that review. In this case, the Eighth Circuit did not review the request for new trial and did not even suggest that the trial court should consider the motion for new trial, even though specific reasons for the new trial or consideration of a new trial by the trial court were suggested by the

5 In *O'Hare v. Merck & Co., Inc.*, 381 F2d 286 (8th Cir 1967), the dissent suggested that a verdict-winner, as either appellee or appellant, may have the right to press for a new trial petition for rehearing.

petitioners in its petition for rehearing. (Petitioners' Appendix pgs. 65-74). As pointed out by the Ninth Circuit in *Gough*, supra, there must be some rule to insure that some court consider the merits of a motion which a party has a right to make. If the petitioners in this case have a right to make the request for consideration of a new trial, then this court should develop some rule to insure that such consideration occurs at either the appellate or trial court level.

Petitioners respectfully submit that the court should grant certiorari to review this important constitutional issue.

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